

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ARMANDO HERNANDEZ MARTINEZ,

Petitioner,

v.

NEIL CLARK,

Respondent.

CASE NO. C07-1497-RSM-JPD

REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner, proceeding pro se, has filed a “Request for Verification of My U.S. Citizenship” pursuant to 28 U.S.C. § 2241, challenging his removal and detention by the U.S. Immigration and Customs Enforcement (“ICE”) on the grounds that he is a United States citizen. (Dkt. 6). Petitioner seeks an order restraining ICE from removing him from the United States, and ordering ICE to release him immediately. *Id.* Petitioner has also filed a Motion for Release on Bond Pending Adjudication and Request for Stay, maintaining that he is a United States citizen. (Dkt. 11). Respondent has filed a Return, Opposition to Motion for Release on Bond, and Motion to Dismiss, arguing that petitioner is a native and citizen of Mexico and that he is lawfully detained pending his removal from the United States. (Dkt. 23).

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1 Having carefully reviewed the entire record, I recommend that petitioner's petition (Dkt.  
2 6) be DENIED, petitioner's motion for release (Dkt. 11) be DENIED, and respondent's motion  
3 to dismiss (Dkt. 23) be GRANTED.

## 4 II. BACKGROUND AND PROCEDURAL HISTORY

5 Petitioner Armando Hernandez Martinez is a native and citizen of Mexico who entered  
6 the United States without inspection at or near San Ysidro, California, on an unknown date in  
7 1969. (Dkt. 19 at L12, R139, R252-53, R309; Dkt. 23, Ex. 1). On October 20, 1994, he was  
8 convicted in California of Possession of a Controlled Substance, to wit: Methamphetamine, in  
9 violation of the California Health and Safety Code, and was sentenced to sixteen months  
10 confinement. (Dkt. 19 at R139, R22). On April 13, 1996, the former Immigration and  
11 Naturalization Service<sup>1</sup> ("INS") issued an Order to Show Cause, charging him with deportation  
12 for having entered the United States without inspection. (Dkt. 19 at L12). On September 13,  
13 1996, an Immigration Judge ("IJ") ordered petitioner deported to Mexico. (Dkt. 19 at L18).  
14 Petitioner waived appeal of the IJ's Order and was deported to Mexico the next day. (Dkt. 19  
15 at L18, L20, R23).

17 On or about May 13, 2004, ICE encountered petitioner at the Lincoln County Jail in  
18 Newport, Oregon, where he was in custody on charges of Delivery and Possession of a  
19 Controlled Substance. (Dkt. 19 at R238). Petitioner freely admitted to being a native and  
20 citizen of Mexico, and having last entered the United States on September 14, 1996, without  
21 inspection. *Id.* Petitioner was convicted of Delivery of a Controlled Substance, and sentenced

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23 <sup>1</sup>Effective March 1, 2003, the Immigration and Naturalization Service was abolished  
24 pursuant to the Homeland Security Act of 2002, 116 Stat. 2135, Pub. L. 107-296, *codified at* 6  
25 U.S.C. § § 101, *et seq.*, and its immigration functions were transferred to the Department of  
26 Homeland Security ("DHS").

1 to 20 days in jail with credit for time served on July 2, 2004. (Dkt. 19 at R215-18, R252).

2 On July 6, 2004, ICE served petitioner with a Notice of Intent to Issue a Final  
3 Administrative Removal Order, charging him with removal from the United States pursuant to  
4 INA § 237(a)(2)(A)(iii), which provides for the removal of “[a]ny alien who is convicted of an  
5 aggravated felony.” (Dkt. 19 at L31). Petitioner admitted the allegations and charges in the  
6 Notice of Intent, and waived the 14 day period of execution of the Final Removal Order. *Id.*  
7 Accordingly, ICE issued a Final Administrative Removal Order to Mexico on July 6, 2004, and  
8 petitioner was removed to Mexico on July 9, 2004. (Dkt. 19 at L32, R260, R257, R251).

9 On or about April 21, 2005, ICE again encountered petitioner at the Lincoln County Jail  
10 where he was in custody on pending probation violations. (Dkt. 19 at R252, R210). While in  
11 custody, petitioner was positively identified by his fingerprints and administrative record. (Dkt.  
12 19 at R250-52). On April 22, 2005, ICE served petitioner with a Notice of Intent to Issue a  
13 Final Administrative Removal Order, charging him with removal from the United States  
14 pursuant to INA § 237(a)(2)(A)(iii), which provides for the removal of “[a]ny alien who is  
15 convicted of an aggravated felony.” (Dkt. 19 at R256-57, L46-49). Petitioner admitted the  
16 allegations and charges in the Notice of Intent, and waived the 14 day period of execution of the  
17 Final Removal Order. (Dkt. 19 at L47). Accordingly, ICE issued a Final Administrative  
18 Removal Order to Mexico on April 22, 2005. (Dkt. 19 at L47).

19 On September 14, 2007, ICE issued a Warrant of Removal/Deportation and a Warning  
20 to Alien Ordered Removed or Deported. (Dkt. 19 at L50-55). On September 24, 2007,  
21 petitioner filed a Petition for Review and a Motion for Stay in the Ninth Circuit Court of  
22 Appeals. *See Martinez v. Mukasey*, No. 07-73769 (9<sup>th</sup> Cir. filed Sept. 24, 2007). Under Ninth  
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1 Circuit General Order 6.4(c)(1)(3), this caused a temporary stay of removal to automatically  
2 issue.

3 On September 25, 2007, petitioner filed the instant habeas petition arguing for the first  
4 time that he is “a native Indian and a citizen of the united states by birth as well as by  
5 deprivatitive [sic] through my parents.” (Dkt. 6). Petitioner subsequently filed a Motion for  
6 Release on Bond Pending Adjudication and Request for Stay of Removal. (Dkt. 11).

7 On February 19, 2008, Respondent filed a Return Memorandum, Opposition to Motion  
8 for Release on Bond, and Motion to Dismiss, arguing that petitioner is a native and citizen of  
9 Mexico. (Dkt. 23). Respondent also submitted new information indicating that petitioner was  
10 granted Lawful Permanent Resident (“LPR”) status on February 18, 1983, when he was twenty  
11 years old under a different alien registration number. (Dkt. 23, Ex. 1). Petitioner’s 1983  
12 Application for Immigrant Visa and Alien Registration states that he was born in Sonora,  
13 Mexico. (Dkt. 23, Ex. 1). An Affidavit of Support submitted by petitioner’s mother in  
14 connection with his application states that she is a citizen of Mexico. (Dkt. 23, Ex. 1 at 9).

15 On January 11, 2008, the Ninth Circuit dismissed petitioner’s Petition for Review, and  
16 the mandate issued on March 25, 2008. *See Martinez*, No. 07-73769.

### 17 III. DISCUSSION

18 Petitioner challenges his underlying removal order by alleging that he is a United States  
19 citizen. (Dkt. 11). He asks this Court “to intervene and restrain bureau of immigration and  
20 customs from removing [him] from united states,” and “to order immigration and customs to  
21 release [him] immediately.” (Dkt. 6).  
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1           A.     Subject Matter Jurisdiction.

2           On May 11, 2005, Congress enacted the REAL ID Act of 2005, which amended the INA  
3 by eliminating all district court habeas jurisdiction over orders of removal and vesting that  
4 jurisdiction in the court of appeals. Pub. L. No. 109-13, Div. B, § 106(a), 119 Stat. 231, 310-  
5 311 (2005) (“REAL ID Act”). The REAL ID Act provides:

6           Exclusive means of review

7           Notwithstanding any other provision of law (statutory or nonstatutory), including  
8 section 2241 of title 28, United States Code, or any other habeas provision, and  
9 sections 1361 and 1651 of such title, a petition for review filed with an appropriate  
10 court of appeals in accordance with this section shall be the sole and exclusive  
11 means for judicial review of an order of removal entered or issued under any  
12 provision of this Act, except as provided in subsection (e).

13           INA § 242(a)(5), 8 U.S.C. § 1252(a)(5). The REAL ID Act further provided:

14           Judicial review of all questions of law and fact, including interpretation and  
15 application of constitutional and statutory provisions, arising from any action taken  
16 or proceeding brought to remove an alien from the United States under this  
17 subchapter shall be available only in judicial review of a final order under this  
18 section. Except as otherwise provided in this section, no court shall have  
19 jurisdiction, by habeas corpus under section 2241 of Title 28, or any other habeas  
20 corpus provision, by section 1361 or 1651 of such title, or by any other provision  
21 of law (statutory or nonstatutory), to review such an order or such questions of  
22 law or fact.

23           INA § 242(b)(9), 8 U.S.C. § 1252(b)(9).

24           As petitioner’s habeas petition presents a challenge to his final order of removal through  
25 his claim to United States citizenship, habeas corpus relief is precluded by the REAL ID Act.  
26           *See Iasu v. Smith*, 511 F.3d 881, 887-88 (9<sup>th</sup> Cir. 2007) (holding that the REAL ID Act  
eliminated habeas jurisdiction over claims to U.S. citizenship). Accordingly, the Court lacks

jurisdiction to address the merits of petitioner's citizenship claim.<sup>2</sup>

B. Detention.

To the extent that petitioner challenges his post-removal-order detention, this Court has jurisdiction to consider his claim. *See Hernandez v. Gonzales*, 424 F.3d 42, 42-43 (1<sup>st</sup> Cir. 2005) (holding that the REAL ID Act was "not intended to 'preclude habeas review over challenges to detention that are independent of challenges to removal orders.'"); *see also Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9<sup>th</sup> Cir. 2006) (holding that the jurisdiction stripping provision of the REAL ID Act does not apply to habeas corpus petitions that do not involve final orders of removal).

Section 241(a)(1)(A) of the INA states that "[e]xcept as otherwise provided in this section, when an alien is ordered removed, the Attorney General shall removed the alien from the United States within a period of 90 days (in this section referred to as the 'removal period')." INA § 241(a)(1)(A), 8 U.S.C. § 1231(a)(1)(A). *See also Thai v. Ashcroft*, 366 F.3d 790, 793 (9<sup>th</sup> Cir. 2004) ("When a final order of removal has been entered against an alien, the Government must facilitate that alien's removal within a 90-day 'removal period.'"). The removal period begins on the latest of the following:

(i) The date the order of removal becomes administratively final.

(ii) If the removal order is judicially reviewed and if a court orders a stay of the removal of the alien, the date of the court's final order.

(iii) If the alien is detained or confined (except under an immigration process), the date the alien is released from detention or confinement.

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<sup>2</sup>Petitioner has requested a stay of removal. Because this Court is without jurisdiction to consider claims challenging an order of removal, this Court is also without jurisdiction to grant a stay of removal that is derived from that challenge to the final removal order.

1 8 U.S.C. § 1231(a)(1)(B)(emphasis added); *see also Khotesouvan v. Morones*, 386 F.3d 1298,  
2 1300 n.3 (9<sup>th</sup> Cir. 2004) (stating that the 90-day removal period commences on “the date the  
3 order of removal becomes final; the date a reviewing court lifts its stay following review and  
4 approval of the order of removal; or the date the alien ordered removed is released from non-  
5 immigration related confinement.”). During the removal period, continued detention is  
6 required. INA § 241(a)(2), 8 U.S.C. § 1231(a)(2) (“During the removal period, the Attorney  
7 General shall detain the alien.”). Where removal cannot be accomplished within the 90-day  
8 removal period, detention beyond the removal period is authorized by INA § 241(a)(6), 8  
9 U.S.C. § 1231(a)(6); *see Zadvydas v. Davis*, 533 U.S. 678, 682, 121 S. Ct. 2491, 150 L. Ed. 2d  
10 653 (2001). In *Zadvydas*, the Supreme Court determined that the Government is entitled to a  
11 presumptively reasonable period of detention of six months to bring about the alien’s removal  
12 from the United States. *Zadvydas*, 533 U.S. at 701. After this six month period, the alien is  
13 eligible for conditional release upon demonstrating that there is “no significant likelihood of  
14 removal in the reasonably foreseeable future.” *Id.* The petitioner has the burden of coming  
15 forward with “good reason to believe there is no significant likelihood of removal in the  
16 reasonably foreseeable future.” *Id.* If the petitioner meets this burden, the government must  
17 produce sufficient evidence to rebut petitioner’s showing. *Id.*

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19 In the present case, the Ninth Circuit dismissed petitioner’s Petition for Review and the  
20 mandate issued On March 25, 2008, thereby commencing the removal period. *See* INA §  
21 241(a)(1)(B)(ii), 8 U.S.C. § 1231(a)(1)(B)(ii). Thus, petitioner’s 90-day removal period will  
22 expire on or about June 25, 2008, and the six month presumptively reasonable period will expire  
23 on or about September 25, 2008. Accordingly, the habeas petition should be denied as  
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1 petitioner is lawfully detained in the removal period.

2 IV. CONCLUSION

3 For the foregoing reasons, I recommend that respondent's motion to dismiss be granted,  
4 and that the action be dismissed. A proposed Order accompanies this Report and  
5 Recommendation.

6 DATED this 2nd day of May, 2008.

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9 JAMES P. DONOHUE  
10 United States Magistrate Judge  
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